

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

CC Docket No. 92-90

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**COMMENTS OF MARC B. HERSHOVITZ, MICHAEL JABLONSKI,  
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The Federal Communications Commission released a Notice of Proposed Rule Making and Memorandum Opinion and Order on September 18, 2002. The Commission made the following specific inquiry:

Based on public inquiries, we also seek comment on prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity. Does the Commission need to specifically address these kinds of telemarketing calls, and, if so, what rules might we adopt to appropriately balance consumers' interest in restricting unsolicited advertising with commercial freedoms of speech?

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rule Making, CG Docket No. 02-278 at ¶ 32 (NPRM).

The FCC does not need to specifically address these kinds of telemarketing calls with additional rules because they are clearly prohibited under the Telephone Consumer Protection Act, 47 U.S.C. § 227, and current FCC regulation, 47 U.S.C. § 64.1200. Moreover, radio and television stations' "commercial freedoms of speech" are not put in issue by the TCPA.

### **Background Information**

There has been a proliferation of the use of automatic telephone dialing systems initiating telephone calls to residential telephone lines using an artificial or prerecorded voice to place messages on answering machines without the prior express consent of the called party.

It is now far too common for someone to come home from work to find the red message waiting light on their answering machine blinking, beckoning the person to listen to their messages. Pressing the “play” button, the weary individual listens, only to hear a message much like this one:

“Hello. Hey, you there? Hello, pick up. Hey, it’s Jimmy from 99-X calling. Yeah, I just wanted to know if I could borrow your car. Oh, I also needed to tell you about the 50,000 Delta SkyMiles we’re giving away on 99-X. Every Monday through Friday at 7, 11, 1, 3, and 5 – 50,000 Delta SkyMiles. It ends this week. Look, if you need more information, just call (404) 287-1008 [ten oh eight]. So listen tomorrow morning at 7. And get back to me about your car.”

After this aural assault, the person mashes the delete button and walks away a little more frustrated than when they walked in their front door.<sup>1</sup>

To paraphrase Senator Ernest Hollings, these computerized calls are the scourge of modern civilization. They wake us up in the morning. They interrupt our dinner at night. They force the sick and elderly out of bed. They take up valuable space on our answering machines, preventing others from getting through. They hound us until we want to rip the telephone right out of the wall. Businesses using these machines are out of control. It is telephone terrorism and it has got to stop.

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<sup>1</sup> Additional transcripts of prerecorded telemarketing messages actually used by radio stations are attached hereto as Exhibit A.

The threat this technology poses to residential privacy cannot be underestimated as some individual companies have the capability of placing more than one million prerecorded telemarketing calls per day. See <http://www.realcallworks.com>.

Radio and television stations have taken to placing telemarketing calls in order to leave prerecorded messages directly on home answering machines. Costing mere pennies for each message placed on a home answering machine, radio and television stations view this guerilla marketing tactic as cheap tool to spike ratings.

The TCPA prohibits the delivery of **all** prerecorded message calls to people who have not consented to receiving them. 47 U.S.C. § 227(b)(1)(B). Congress, however, permitted the FCC to exempt from the prohibition calls which are non-commercial and commercial calls which do not adversely affect the privacy rights of the called party **AND** which do not contain an unsolicited advertisement. 47 U.S.C. § 227(b)(2)(B) (emphasis added); Report and Order, 7 F.C.C.R. 8752, 8780 ¶ 55 (1992). The phrase “unsolicited advertisement” is defined by Congress and the FCC to mean “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 U.S.C. § 227(a)(4) (emphasis added); see also, 47 C.F.R. § 64.1200(f)(5) (identical definition to that found in 47 U.S.C. § 227).

Prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity are illegal under the TCPA and current FCC regulation. They are illegal because they promote the commercial availability and/or quality of services (radio or television broadcast

services) and/or property (the prize, or the opportunity to win a prize, offered as a quid pro quo for tuning in).

As a tool in spiking ratings, radio and television stations' use of prerecorded telemarketing messages must be successful or we would not have seen the proliferation of these telemarketing calls over the past several years. In order to avoid accepting responsibility for their illegal answering machine advertising campaigns, the telemarketers have employed a phalanx of lawyers to try to create confusion in the law where, in fact, none exists.

These comments that follow will demonstrate (1) that prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity are illegal under the TCPA and current FCC regulation, and (2) that the First Amendment and freedom of speech considerations are not implicated by the TCPA's ban on prerecorded telemarketing calls to the home. It is for these reasons the FCC does not need to specifically address these kinds of telemarketing calls with additional rules. Put more simply, there is no need to clarify that which is already clear.

#### **Citation of Authority**

#### **I. PRERECORDED TELEMARKETING CALLS INITIATED BY RADIO OR TELEVISION STATIONS THAT ENCOURAGE TELEPHONE SUBSCRIBERS TO TUNE IN AT A PARTICULAR TIME FOR A CHANCE TO WIN A PRIZE OR SOME SIMILAR OPPORTUNITY ARE ILLEGAL UNDER THE TCPA AND CURRENT FCC REGULATION.**

The TCPA prohibits telemarketers – whether or not they are also radio or television stations – from “initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless

the call is initiated for emergency purposes or is exempted by rule or order by the [Federal Communications] Commission.” 47 U.S.C. § 227(b)(1)(B).

As Justice Louis Brandeis recognized, “The right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men.” Olmstead v. U.S., 277 U.S. 438, 478 (1928). It was this sentiment, among other things, that led Congress to respond to the nuisance and intrusion of certain telemarketing practices by adopting the TCPA. See 137 Cong. Rec. S16204-01 at 16205 (1991).

Congress struck a balance between the telemarketers’ ability to practice their trade and the public’s right to be let alone when it enacted the TCPA. See Id. (discussing industry representatives supported passage of TCPA); see also S. Rep. No. 178, 102d Cong., 1st Sess. (1991), reprinted in 1991 U.S.C.C.A.N. 1968. Congress determined that banning automated or prerecorded telephone calls to the home is the only effective means of protecting telephone consumers from this nuisance and privacy invasion. See Telephone Consumer Protection Act of 1991, Pub. L. 102-243, 105 Stat. 2394, § 2(12) (Congressional Statement of Findings).

The TCPA prohibits the delivery of **all** prerecorded message calls to people who have not consented to receiving them. 47 U.S.C. § 227(b)(1)(B). Congress, however, permitted the FCC to exempt from the prohibition calls which are non-commercial and commercial calls which do not adversely affect the privacy rights of the called party **AND** which do not contain an unsolicited advertisement. 47 U.S.C. § 227(b)(2)(B) (emphasis added).

The FCC exempted certain telephone calls from the blanket ban created by Congress by creating a specific “term of art” definition for the term “telephone call.” Section 64.1200(c) of Title 47 of the Code of Federal Regulations provides as follows:

(c) The term "telephone call" in sec. 64.1200(a)(2) shall not include a call or message by, or on behalf of, a caller:

- (1) that is not made for a commercial purpose,
- (2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,
- (3) to any person with whom the caller has an established business relationship at the time the call is made, or
- (4) which is a tax-exempt nonprofit organization.

Radio and television stations contended that their telemarketing calls that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity are exempt from the prohibition of the TCPA because they are not made for a commercial purpose. Alternatively, they contended that – even if their telemarketing calls are made for a commercial purpose – they are exempt because they do not contain unsolicited advertisements. The radio and television stations are wrong on both counts.

**A. These Answering Machine Advertising Campaigns Are for a Commercial Purpose.**

Radio stations and telemarketers, trying to avoid accepting responsibility for their illegal answering machine advertising campaigns, argue that a call is not made for a commercial purpose if it lacks a solicitation for a sale. They are wrong.

Pursuant to Congressional authorization, the FCC exempted those telephone calls “not made for a commercial purpose” from the prohibition on delivering prerecorded messages to residences. See 47 U.S.C. § 227(b)(2)(B); 47 C.F.R. § 64.1200(c).

It is a fundamental rule of statutory construction that where the language of a statute is plain and unambiguous, the terms used therein should be given their common and ordinary meaning. E.g., Williams v. Taylor, 529 U.S. 420, 120 S.Ct. 1479, 1488 (2000).

The common and ordinary meaning of “commercial” is “having profit as a chief aim.” American Heritage Dictionary of the English Language (4th ed. 2000).<sup>2</sup> The common and ordinary meaning of “purpose” is “the object toward which one strives or for which something exists; an aim or goal.” American Heritage Dictionary of the English Language (4th ed. 2000). Accordingly, the common and ordinary meaning of the phrase “commercial purpose” is “the objective of realizing profit.”

Nowhere in the TCPA or 47 C.F.R. § 64.1200 is it suggested that the defining element of all non-commercial calls is the absence of a solicitation for a sale. Neither the TCPA nor 47 C.F.R. § 64.1200 state positively that in order for a call to be made for a commercial purpose it must necessarily contain a solicitation for a sale.

A debt collection call does not contain a solicitation for a sale. It would be silly to contend that debt collection calls are not made for a commercial purpose just because they do not ask the recipient to buy something.

Whether or not a call is made for a commercial purpose does not depend upon whether it contains a solicitation for a sale. While all calls containing a solicitation for a sale are made for a commercial purpose, not every call made for a commercial purpose contains such a solicitation as the debt collection example makes clear.

Prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar

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<sup>2</sup> The United States Supreme Court has itself used the American Heritage Dictionary of the English Language to ascertain the ordinary, contemporary, common meaning of terms. See Village of Hoffman Estates v. Flipside, 455 U.S. 489, 501 n.18 (1982) (using American Heritage Dictionary of the English Language to define “roach clip”).

opportunity are designed to boost ratings – and, therefore, station profits – by touting the stations’ broadcasts and/or offering a quid pro quo for tuning in (a prize, or the opportunity to win a prize). These telemarketing calls are made for the objective of realizing profit, the ordinary, contemporary, common meaning of the term commercial purpose. Accordingly, because these prerecorded telemarketing calls are made for a commercial purpose and contain unsolicited advertisements, they violate the TCPA when they are transmitted without the called parties’ prior express invitation or permission.

**B. Prerecorded Telemarketing Calls That Encourage Telephone Subscribers to Tune in at a Particular Time for a Chance to Win a Prize or Some Similar Opportunity Are Unsolicited Advertisements Within the Meaning of the TCPA and 47 C.F.R. § 64.1200.**

Prerecorded telemarketing calls which contain unsolicited advertisements are prohibited by the TCPA and 47 C.F.R. § 64.1200. It is without question that the telemarketing calls placed by radio and television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity are unsolicited advertisements within the meaning of the TCPA and 47 C.F.R. § 64.1200.

The phrase “unsolicited advertisement” was defined Congress and the FCC. It means “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 U.S.C. § 227(a)(4); see also, 47 C.F.R. § 64.1200(f)(5) (identical definition to that found in 47 U.S.C. § 227). The word “advertising” used in the definition of the term “unsolicited advertisement” is not itself further defined; its common and ordinary meaning is “the activity of attracting public attention



to a product or business as by paid announcements in print or on the air.” American Heritage Dictionary of the English Language (4th ed. 2000).

The prerecorded telemarketing calls initiated by radio or television stations are sophisticated and slickly crafted to attract public attention to their broadcast services and highlight the quality of their programming. See Exhibit A. The calls target residential home answering machines. It is not uncommon for the telemarketing company executing the answering machine advertising campaign to have its machines hang up if a live person happens to answer the telephone call. The prerecorded messages use the voices of the stations’ on-air personalities or other celebrities to deliver their messages. The scripts are designed to fool an unwary recipient into believing that the on-air personality or other celebrity actually placed a personal call to him or her at home. See Exhibit A.

The prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity advertise – meaning: seek to attract public attention to – (1) the commercial availability of a service (their broadcast service) and (2) the commercial availability of property (the prize, or the opportunity to win a prize, offered as a quid pro quo for tuning in).

**1. These prerecorded telemarketing calls advertise the commercial availability of a service (a radio or television broadcast service).**

Radio or television broadcasts are services given the (a) ordinary, contemporary, common meaning of the term, and (b) the FCC’s classification of radio and television broadcasting as services,.

“Service” means “work done for others as an occupation or business.” American Heritage Dictionary of the English Language, (4th ed. 2000). Clearly, the business of providing

entertainment and information by means of a radio or television broadcast is a service according to that term's ordinary, contemporary, common meaning.

The FCC itself believes that radio and television broadcasts are services within the ordinary, contemporary, common meaning of the term. Part 73 of Title 47 of the Code of Federal Regulations set out the FCC Regulations governing radio broadcasts and is entitled "Radio Broadcast Services." (emphasis added). Part 76 of Title 47 of the Code of Federal Regulations is entitled "Multichannel Video and Cable Television Service." (emphasis added).

Radio and television stations' lawyers, seeking to create confusion where none exists, try to "cut and paste" alternative definitions for "commercial purpose" and "unsolicited advertisement" into the TCPA as substitutes for what Congress and the FCC actually said. However, these attempts to muddle the clear legal waters is unavailing because, as the Fifth Circuit Court of Appeals recognized in In re Abbott Laboratories, 51 F.3d 524 (5th Cir. 1995), "We cannot search legislative history for congressional intent unless we find the statute unclear or ambiguous. Here, it is neither."

Prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity advertise are designed to encourage those receiving the messages to make a choice in the radio or television broadcast service marketplace, a choice to listen to or watch a particular channel. That one does not necessarily have to pay cash to listen to or watch radio or television broadcast channels is immaterial.<sup>3</sup> Listening to or watching to one station is a choice against

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<sup>3</sup> Radio and television stations charge advertisers rather than listeners or viewers. Advertising rates are set based on a station's audience, the number of individuals tuning in. A station's advertisers pay when the listening public listens or watches a particular channel. The listening or viewing public may not pay cash to listen to or watch radio or television broadcast (continued...)

listening to or watching competing stations. The choice to listen to or watch a particular station represents a choice among the competing broadcast services. Prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity simply promote the commercial availability of the stations' broadcast services by trying to influence these choices.

Without question, these prerecorded telemarketing calls advertised the commercial availability and quality of the radio and television stations that use them.

**2. These prerecorded telemarketing calls advertise the commercial availability of a service (their broadcast service).**

Delivery of prerecorded messages advertising the commercial availability of property violate the TCPA. The telemarketing calls under consideration here unambiguously offer a chance to receive valuable property for listening to or watching certain radio or television programming.

Radio and television stations exhort the commercial availability and quality of property (the prize, or the opportunity to win a prize), and offer an explicit quid pro quo to the call recipient: listen or watch at certain times for the opportunity to receive the property.

The property offered by the telemarketing radio and television stations is varied. Frequently it is money. At other times it is tickets to concerts or sporting events or airline frequent flyer miles. Sometimes it may be intangible property, but it is property nonetheless. When an individual listens to or watches a radio or television broadcast in order to try and get the offered prize, the stations receive something of value – increased listener or viewership – for providing an opportunity to

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<sup>3</sup>(...continued)  
channels , but the stations certainly do get compensated when the public tunes in. The stations get paid by their advertisers.

receive property. Quite simply, the radio and television stations exchange the prospect of receiving a prize for expanded listener or viewership.

The radio or television stations that initiate the telemarketing calls at issue do not give their “prizes” as gifts, acts of detached and disinterested generosity. They offer an exchange supported by consideration and mutuality of obligation. This consideration and mutuality of obligation may not be of the character necessary to make the transaction illegal as a lottery or other game of chance under various state and federal laws, but it is hornbook law that giving a chance to receive “prizes” in exchange for listening or watching is supported by consideration and mutuality of obligation. Lucky Calendar Co. v. Cohen, 117 A.2d 487, 495 (1955). Whether tuning into radio or television stations at stated times is sufficient consideration for a contract depends only on whether it was the requested detriment to the promisee induced by the promise. Id. Applying the analysis of Lucky Calendar Co. to the telemarketing calls at issue here, tuning in at certain times to a radio or television broadcast is a detriment and inconvenience which enures to the benefit of station, a classic form of consideration.<sup>4</sup>

Radio and television stations do significantly more than just invite the recipients of its recorded messages to listen to or watch a particular radio or television broadcast with the

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<sup>4</sup> The New Jersey Supreme Court held in Lucky Calendar Co. v. Cohen, 117 A.2d 487 (1955), that a grocery store “give-away” contest did constitute an illegal lottery under New Jersey law. The scheme in Lucky Calendar Co. required participants to visit an Acme Supermarket, and deposit a card on which their name and address was written. No purchase was necessary. The New Jersey Supreme Court in an opinion by Chief Justice Vanderbilt held that the scheme was an illegal lottery, in part due to the consideration present, the detriment or inconvenience to the participant of visiting the supermarket which afforded a benefit to the store. Id. at 495.

telemarketing calls under consideration here.<sup>5</sup> They go a step further: promising a chance to win valuable property to induce compliance. They offer a quid pro quo. Accordingly, these calls advertise the commercial availability of property and therefore are unsolicited advertisements prohibited by the TCPA.

## **II. THE TCPA IS A CONSTITUTIONAL PLACE AND MANNER RESTRICTION.**

When a radio or television station's conduct is challenged in any way, they frequently try to cloak their conduct with First Amendment constitutional rubric. While the media does enjoy a favored status in our democracy, when the media acts as telemarketers they do not get special dispensation just because they are radio or television stations.

Congress constitutionally restricted the use of prerecorded messages delivered to residential telephone lines when it enacted the TCPA. Moser v. Federal Comm. Comm'n, 46 F.3d 970 (9th Cir.), cert. denied, 515 U.S. 1161 (1995). In Moser, the United States Court of Appeals for the Ninth Circuit rejected a challenge to the TCPA on First Amendment grounds.<sup>6</sup> In fact, no court has ever found a constitutional infirmity in the TCPA's ban on the use of prerecorded messages delivered to residential telephone lines.

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<sup>5</sup> And such calls would be prohibited by the TCPA and FCC regulation, too.

<sup>6</sup> See also Szefczek v. Hillsborough Beacon, 668 A.2d 1099, 1109 (N.J. Sup. Ct. 1995) (holding TCPA's ban on prerecorded telemarketing calls does not violate First Amendment); cf. Bland v. Fessler, 88 F.3d 729, 739 (9th Cir. 1996) (holding California statute restricting use of prerecorded telemarketing calls did not violate First Amendment); Van Bergen v. Minnesota, 59 F.3d 1541 (1995) (holding Minnesota statute restricting use of automatic dialing and announcing devices did not violate First Amendment); Humphrey v. Casino Marketing Group, Inc., 491 N.W.2d 882, 891-92 (Minn. 1992) (holding Minnesota statute restricting use of automatic dialing and announcing devices did not violate First Amendment).

The TCPA ban on prerecorded messages delivered to residential telephone lines is a content-neutral place and manner restriction because the TCPA prohibits the delivery of all prerecorded message calls to the homes of people who have not consented to receiving them. Moser, 46 F.3d at 973. Accordingly, “commercial freedoms of speech” are not put in issue by the TCPA.

“The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community.” Kovacs v. Cooper, 336 U.S. 77, 83 (1949) (upholding prohibition on use of sound trucks). The use of prerecorded messages delivered to residential answering machines by automatic dialing and announcing devices is the modern version of 1940s sound trucks. Both activities can be constitutionally restricted.

The Supreme Court recognizes the governmental interest in protecting the privacy of the home — the “last citadel of the tired, the weary, and the sick” in Justice Black’s famous phrase — is “of the highest order.” See Frisby v. Schultz, 487 U.S. 474, 484 (1988) (upholding ban on anti-abortion protesters picketing an individual’s home). When it comes to restrictions on speech, “the home is different.” Id.

One important aspect of residential privacy is the protection of the unwilling listener. Id. “There is simply no right to force speech into the home of an unwilling listener.” Id. Radio and television stations engaging in the kind of telemarketing campaigns under discussion here do precisely that, they capture people’s home answering machines and compel those called to become unwilling listeners to their telemarketing spiels. Radio and television stations can claim no constitutional warrant to do this.

Like an ordinance barring sound trucks on city streets or protesters outside a home, Congress legally barred the delivery of prerecorded messages to residential answering machines. Automatic dialing and delivery devices playing prerecorded messages would crowd out other communications and destroy the quiet and tranquility people seek to maintain in their homes unless reasonable restrictions are imposed by legislative and regulatory action. The rights of free speech do not compel government to allow the invasion of residential privacy.

The TCPA merely imposes restrictions on a particular manner of speech (prerecorded messages) delivered to a particular location (the home). Government can impose reasonable restrictions on the time, place, or manner of speech. E.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

Congress, after study, enacted the TCPA to ban telephone calls with prerecorded messages to homes. Congress made a specific finding that “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.” Telephone Consumer Protection Act of 1991, PL 102-243, 105 Stat. 2394, § 2 (Congressional Statement of Findings).

Time, place and manner restrictions must be justified without reference to the content of the regulated speech, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Ward, 491 U.S. at 791; Moser, 46 F.3d at 972.

The appropriate inquiry is whether a ban on automated telemarketing calls is narrowly tailored to protect the interest of residential privacy, and whether ample alternative channels of communication remain open. Moser, 46 F.3d at 972.

The TCPA directly advances the substantial governmental interest of protecting people's privacy. Moser, 46 F.3d 970 (9th Cir. 1995). It prevents individuals from having to bear the burden and inconvenience of prerecorded messages on answering machines except in the case of emergencies or when the persons called specifically consented to it. See Szefczek, 668 A.2d at 1108 (stating "the substantial interest of protecting residential privacy is directly advanced by the TCPA"). An answering machine cannot hang up on a recording, and a recording cannot take a person's name to put on a do-not-call list.

The TCPA allows many alternative channels of communications, including the use of taped messages introduced by live speakers or taped messages to which consumers have consented, as well as all live solicitation calls. Moser, 46 F.3d at 974. ***That some companies prefer the lower cost and greater efficiency of automated telemarketing on a vast scale to deliver prerecorded advertisements does not prevent Congress from restricting the practice.*** Id.; Kovacs, 336 U.S. 77, 88-89 (1949) (stating "that more people may be more easily and cheaply reached . . . is not enough to call forth constitutional protection").

As the United States Court of Appeals for the Ninth Circuit said in Moser,

[t]he provision in the Telephone Consumer Protection Act of 1991 banning automated, prerecorded calls to residences is content-neutral. Congress adequately demonstrated that such calls pose a threat to residential privacy. The ban is narrowly tailored to advance that interest, and leaves open ample alternative channels of communication. Thus, it does not violate the First Amendment.

46 F.3d 970, 975.

Again, radio and television stations do not get special dispensation when the act as telemarketers just because they are radio or television stations. When they engage in telemarketing,



their speech is no more or less protected than that of any other telemarketer. It is quite clear that “commercial freedoms of speech” are not put in issue by the TCPA.

### **Conclusion**

For the foregoing reasons, The FCC does not need to specifically address prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity with additional rules. Radio and television stations’ “commercial freedoms of speech” are not put in issue by the TCPA. These calls by radio and television stations are illegal under the TCPA and current FCC regulation. There is no need to clarify that which is already clear.

Respectfully submitted this 20th day of November, 2002.

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## **EXHIBIT A**

Transcripts of prerecorded telemarketing messages actually used by radio stations.

### **WBTS-FM**

“Hey, what’s up? This is Britney Spears, Yeah, it’s me. And now there’s a brand new radio station in Atlanta that plays my music and all the best music—it’s the new 95point5 The Beat. That new radio station everyone is talking about. Tune in 95.5 right now and tell your friends...Oh! And if you want to win ten thousand dollars, The Beat is giving it away, just listen for two songs back to back from me, Britney Spears, and be the 95<sup>th</sup> caller at 404-741-095point5 and you’ll win from the new 95point5 The Beat Atlanta’s new number one hit music station.”

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### **WNNX-FM**

Hello. Hey, you there? Hello, pick up. Hey, it’s Jimmy from 99-X calling. Yeah, I just wanted to know if I could borrow your car. Oh, I also needed to tell you about the 50,000 Delta SkyMiles we’re giving away on 99-X. Every Monday through Friday at 7, 11, 1, 3, and 5 – 50,000 Delta SkyMiles. It ends this week. Look, if you need more information, just call (404) 287-1008 [ten oh eight]. So listen tomorrow morning at 7. And get back to me about your car.

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### **WNNX-FM**

Hi. This is Leslie from the Morning-X on 99-X. I just wanted to make sure that you were included in Delta Destination II. Over the next 5 weeks, 99-X is giving away 7 million Delta SkyMiles. I wanted to personally give you the times to listen each weekday to win. Starting at 7 A-M on the Morning-X, and then at 11, 1, 3, and 5, you could win 50,000 Delta SkyMiles. Here’s the number to call for more information: (404) 266-0997. Good luck.

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(continued...)

**WSB-FM**

- VOICE 1: Hey it's Kelly and Alfa, the new morning guys at B98.5FM! Yeah, wish we could have got ya in person.
- VOICE 2: Yeah, because we want you to get your share of the cash we're giving away with the big money \$10,000 workday payday!
- VOICE 1: One thousand dollars every hour from 8 a.m. to 6 p.m. tomorrow!
- VOICE 2: Yeah, so set your radio to 98.5 FM, that's B98.5 FM. Wake up with us then listen for your chance to win a thousand dollars!
- VOICE 1: We'd really love for you to win, so here's the phone number...it's 404-741-0985.
- VOICE 2: Oh, and don't forget to try our 9 a.m. all music hour!
- VOICE 1: A full hour of music to start your workday with B98.5 FM!